

Message Text

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ACTION IO-13

INFO OCT-01 ADP-00 AF-10 ARA-11 EA-11 EUR-25 NEA-10 RSC-01

CIAE-00 DODE-00 PM-09 H-02 INR-10 L-03 NSAE-00 NSC-10

PA-03 PRS-01 SS-15 USIA-12 OMB-01 ACDA-19 SAJ-01

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R 141630 Z MAY 73

FM USMISSION GENEVA

TO SECSTATE WASHDC 9295

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C O N F I D E N T I A L GENEVA 2259

E. O. 11652: GDS

TAGS: PFOR, UN

SUBJ: DEFINITION OF AGGRESSION COMMITTEE: PRIORITY AND INTENT

1. AT MEETING OF CONTACT GROUP III, AM MAY 11, GUYANAN REP (SANDERS) TABLED NEW, COMPROMISE PROPOSAL ON PRIORITY AND INTENT. TEXT FOLLOWS: QUOTE INFULFILLING ITS OBLIGATION UNDER ARTICLE 39 OF THE UNITED NATIONS CHARTER TO DETERMINE THE EXISTENCE OF ANY ACT OF AGGRESSION, THE SECURITY COUNCIL MAY DRAW SUCH INFERENCES AS ARE APPROPRIATE FROM THE SURROUNDING CIRCUMSTANCES INCLUDING ANY EVIDENCE OF THE PURPOSES OF THE STATES INVOLVED AND THE NATURE OF THE ACTS COMMITTED. IN PARTICULAR, IT SHALL INFER THAT THE STATE WHICH FIRST KNOWINGLY RESORTED TO THE USE OF ARMED FORCE HAS COMMITTED AN ACT OF AGGRESSION UNLESS THERE ARE OTHER FACTORS ON THE BASIS OF WHICH A CONTRARY INFERENCE MAY BE JUSTIFIED. UNQUOTE.

2. TEXT OF PROPOSAL HAD BEEN CLEARED IN ADVANCE WITH A FEW OF THE MORE MODERATE MEMBERS OF NON- ALIGNED GROUP. MOREOVER, IN ATTEMPT GAIN ARAB SUPPORT, SANDERS HAD SHOWN TEXT TO PROMINENT IRAQI JUSIST YASSEE (NOW
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SERVING ON ILC), WHO REPORTEDLY APPROVED IT.

3. SANDERS ALSO SHOWED TEXT TO US IN ADVANCE. DURING PRIVATE, PRE-MEETING DISCUSSION, WE RAISED NUMBER OF OBJECTIONS TO PROPOSAL, AND SANDERS MADE SEVERAL MODIFICATIONS IN ATTEMPT TO MEET OUR CONCERNS. WHILE WE MADE IT CLEAR THAT WE WERE NOT IN POSITION TO ACCEPT THIS DRAFT OR THIS APPROACH, WE TOLD HIM WE WOULD CONSIDER IT SERIOUS NEGOTIATING DOCUMENT. DURING CONTACT GROUP DISCUSSION OF TEXT, WE WELCOMED ATTEMPT AT COMPROMISE, BUT NOTED PROBLEMS STILL PRESENT IN PROPOSAL AND EMPHASIZED COMPROMISE NATURE OF "DUE REGARD" FORMULA IN EXISTING ALTERNATIVE

2. NO DELS TOOK FIRM POSITION ON PROPOSAL DURING MEETING.

4. WHILE ABSENCE OF REACTIONS BY OTHER DELS MAKES IT PREMATURE TO CONSIDER THIS TEXT A STRONG POSSIBILITY FOR COMPROMISE, DELEGATION WISHES MAKE FOLLOWING COMMENTS ON THE PROPOSAL:

(A) IT AVOIDS CONCEPT OF "PRESUMPTION." WE ARE NOT ENTIRELY CERTAIN WE UNDERSTAND WHAT DEPARTMENT HAD IN MIND BY REFERENCE TO "STIGMA" ATTACHED TO FIRST USE OF FORCE BY NOTION OF "PRESUMPTION" (REFTEL). WE ASSUME DEPARTMENT DID NOT MEAN TO SUGGEST THAT PRIORITY FACTOR, WHICH WE HAVE ALREADY AGREED SHOULD BE TAKEN INTO ACCOUNT, SHOULD NOT BE REGARDED AS OPERATING AGAINST THE FIRST USER OF ARMED FORCE. THE QUESTION AS WE SEE IT, THEREFORE, IS HOW MUCH WEIGHT SHOULD BE GIVEN TO THIS FACTOR. GUYANESE TEXT HANDLES THIS VERY NEATLY, IN OUR VIEW, BY PROVIDING FOR "INFERENCE" ON BASIS OF THIS FACTOR UNLESS THERE EXIST OTHER FACTORS WHICH MAY JUSTIFY CONTRARY INFERENCE. WE BELIEVE THIS SIMPLY STATES A TRUISM, AND WE NOTE THAT IT DOES NOT REQUIRE AN INFERENCE EITHER WAY IF THERE ARE FACTORS POINTING IN BOTH DIRECTIONS (ALWAYS THE CASE EXCEPT IN THE CLEAREST POSSIBLE INSTANCES).

(B) USE OF TERM "INFERENCE" HAS ADVANTAGE OF AVOIDING PROCEDURAL CONNOTATIONS, IN THAT IT DOES NOT REQUIRE "CONCLUSION" OR "DETERMINATION." THUS SECURITY COUNCIL MAY "INFER" EXISTENCE OF AGGRESSION BUT DECIDE INFERENCE

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NOT STRONG ENOUGH, OR OTHER FACTORS SUFFICIENTLY IMPORTANT, THAT THERE SHOULD NOT BE "DETERMINATION" OF EXISTENCE OF ACT OF AGGRESSION UNDER ARTICLE 39 OF CHARTER.

(C) BY REFERRING TO FIRST "USE OF ARMED FORCE" RATHER THAN FIRST ACT ON LIST, FORMULATION LEAVES UNAFFECTED ARGUMENT THAT A PARTICULAR USE OF FORCE WAS IN

RESPONSE TO ANOTHER USE OF ARMED FORCE AGAINST WHICH RIGHT
OF SELF- DEFENSE EXISTS, EVEN IF LATTER NOT ON THE LIST.

(D) FORMULATION PUTS PRIORITY PRINCIPLE CLEARLY IN
CONTEXT OF SECURITY COUNCIL CONSIDERATION, RATHER THAN
CREATING PRINCIPLE DESIGNED TO OPERATE INDEPENDENTLY OF
COUNCIL (WHICH HAS BEEN OBJECTIVE OF MANY DELS, PARTICU-
LARLY SPAIN AND MEXICO).

(E) THIS IS FIRST TIME THAT PROPOSAL FROM ANY NON-
ALIGNED DELEGATION HAS EXPRESSLY ACCEPTED RELEVANCE OF
" PURPOSE" TO DETERMINATION OF ACT OF AGGRESSION. BY
REFERRING TO " EVIDENCE" OF PURPOSE, IT MAY AVOID OBJECTION
THAT " PURPOSE" OR " INTENT" IS A SUBJECTIVE ELEMENT AND THAT
AGGRESSION SHOULD BE " DEFINED" IN OBJECTIVE TERMS. (WE
MIGHT PROPOSE MODIFICATION TO REFER SPECIFICALLY TO
PURPOSES " IN CONFORMITY WITH ESTABLISHED PRINCIPLES OF
INTERNATIONAL LAW" ALONG LINES OF POSITION PAPER).

5. WHILE WE HAVE NOT YET HAD REACTIONS FROM OTHER NON-
ALIGNED DELS, THIS FORMULATION WILL PROBABLY BE VERY
DIFFICULT FOR MANY OF THEM TO ACCEPT, SINCE IT DOES NOT
OPERATE AUTOMATICALLY AND, IN FINAL ANALYSIS, SIMPLY
STATES LOGICAL TRUISM. HOWEVER, FRENCH REP CHAUMONT, ONE
OF MAIN EXPONENTS OF PRIORITY PRINCIPLE IN COMMITTEE, HAS
INDICATED PRIVATELY THAT HE COULD ACCEPT SOMETHING LIKE
GUYANESE FORMULA WITH POSSIBLE REORGANIZATION TO PLACE
" INFERENCE" ON BASIS OF FIRST USE AT BEGINNING OF
PROVISION. SOVIETS, WHO ALSO HAVE HISTORICALLY FAVORED
CLEAR STATEMENT OF AUTOMATIC PRIORITY PRINCIPLE, HAVE
TOLD US THEY PREPARED TO WORK HARD WITH NON- ALIGNED
FOR ACCEPTANCE OF THIS TEXT, BUT WE UNDERSTAND THEY MAY
BE BACKING AWAY FROM IT IN LIGHT OF EMPHASIS ON SECURITY
COUNCIL CONSIDERATION. BASSIN
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